

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.4554 OF 1983

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
 2. To be referred to the reporters or not ?
 3. Whether their lordships wish to see the fair copy of the judgment ?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
 5. Whether it is to be circulated to the Civil Judge?

SHRI D.D. UPADHYAYA & ORS.
VERSUS
THE STATE OF GUJARAT & ORS.

Appearance:

MR PV HATHI for the Petitioners
MR SN SHELAT, Addl. Advocate General
for Respondent No.1
None present for Respondent No.2
MRS. KETTY A MEHTA for Respondents No.3,4,5, & 6

Coram: S.K. Keshote,J
Date of decision:27/07/1998

C.A.V. JUDGMENT

#. The petitioners, eight in all, Assistants working in the Legal Department of the Sachivalaya, Gandhinagar, have filed this special civil application and prayed for quashing and setting aside the orders annexure-G and G1, dated 8th August, 1983 and 20th August, 1983, respectively, under which private respondents were ordered to be promoted to the cadre of section officers. Further prayer has been made by the petitioners to prepare the seniority list of Assistants working in the Legal Department of Sachivalaya, after treating the orders at annexure-C and annexure-D as ineffective and void for all purposes. Under annexure-C services of private respondents as Legal Assistants, were regularized and they were appointed to officiate as Assistants in the Legal Department, in exercise of the powers conferred by Rule 16(ii) and (iii) of the Gujarat Civil Services (Classification and Recruitment) Rules, 1967 (in short referred hereinafter as 1967 Rules) and in relaxation of the provisions of Rules 8, 9 and 10 of the said Rules. This has been stated to be done in the interest of public service. Under order annexure-D dated 25th April 1978 six persons named therein inclusive of private respondents were ordered to be granted exemption from passing of post entry training examination.

#. The facts of the case are that all the petitioners were recruited as Assistants in the Legal Department of Sachivalaya on being selected for the said post by the Gujarat Public Service Commission. After their selection, they have undergone the prescribed training and have passed the prescribed departmental examination and thereafter were regularly appointed on the post of Assistants. The service particulars together with the date of appointment and educational qualifications of the petitioners have been given in annexure-A.

#. The posts of Assistants and Section Officers are upper division posts in the Sachivalaya. Recruitment and other service conditions in the upper division of the Secretariat Service are regulated under the rules framed under Article 309 of the Constitution, known as Assistant (In the Upper Division of the Subordinate Secretariat Service) Recruitment Rules, 1966 (hereinafter referred to as the "Rules 1966"). Under the said Rules appointment on the post of Assistant is required to be made first by direct selection on the basis of the result of competitive examination held by the Gujarat Public Service Commission or by transfer from amongst Stenographers (Grade I) in the Secretariat Service; and second - by promotion of a person of proved merit and

efficiency from amongst the members of the joint cadre of clerks and English and Gujarati Typists, etc., For being eligible for appointment by selection through GPSC a candidate is required to hold degree in Arts, Science, Law etc., and the selected candidate shall have to pass Gujarati or Hindi examination according to the Rules and to undergo prescribed training and pass prescribed departmental examination.

#. There is no dispute that the training and departmental examinations are prescribed under the Rules 1966, and only after taking the aforesaid training and passing the examination a candidate can be appointed on the regular post of Assistant. The Gujarat Public Service Commission ("GPSC") held competitive examination for filling up the posts of Assistants in Secretariat intermittently after coming into force of the Rules 1966. These competitive examinations, as per the petitioners' pleadings in the special civil application, were held in the year 1970, 1972, November 1974, December 1976 and December, 1978. Special examination was held for the Assistants of the Legal Department in the year 1979.

#. One Mr. N.V.Shah was Deputy Secretary in the Legal Department of the Sachivalaya. Though the recruitment to the post of Assistants were to be made through the GPSC he had got his daughter, respondent No.5 herein, and others, the respondents No.3 to 4 and 6, appointed to the post of Assistants through Employment Exchange. The appointments of the aforesaid persons were stated to be illegal, being dehors the recruitment rules of 1966. Not only the entry of these respondents was bad and illegal, what the petitioners have stated that through the helping hand of Deputy Secretary Mr. N.V. Shah they further got their regularization in service on the post of Assistant by resorting to Rule 16 of the Rules, 1967. The matter is not ended here, what the petitioners urged, but they were further exempted from undergoing training and passing the departmental examination. There was nothing in the interest of public service, the petitioners submits, to confer the status of regular employees to these private respondents who have manipulated their entry in service from back door. So both the orders at annexures-C and D dated 19th February, 1976 and 25th August, 1978 respectively were challenged on the ground of being arbitrary and illegal. The consequences of those two orders resulted in assignment of higher seniority to these persons over the petitioners who are regularly recruited after having been selected by the GPSC on the post of Assistants. The petitioners urge that they came to know for the first time by circular

dated 26th April, 1983 under which seniority list of Assistants were published showing therein position as on 1-1-1983, and the private respondents who were not so far included in the seniority list were shown at serial No.5 to 8 i.e. above the petitioners. Thus the petitioners protested against the those notifications annexure-C and D, on coming to know about the same, by filing representation dated 25th May, 1983. Reference has been made by the petitioners to the opinion of the Secretary of the Legal Department giving in the case of Mr. K.C.Munia in the matter of recruitment and passing of departmental examination of Assistants. It has further been stated that this very Department in the case of similarly situated employees have adopted a different standard. The objections filed by the petitioners vide representation dated 25th May, 1983 were not decided and, further, by orders dated 8th August, 1983 and 20th August, 1983, respondents No.3,4 and 5 were promoted though on purely temporary basis as Section Officers for a period of six months or till further further orders are passed.

#. Affidavit in reply has been filed by Mr.V.K.Kothare, Deputy Secretary to Government, Legal Department, on 20th January, 1996. Affidavit in reply has also been filed on behalf of respondents No.3 to 6. The petitioners filed rejoinder affidavit in this case on 17th February, 1997. Affidavit in sur-rejoinder is filed by respondents No.3, 4 and 6. In pursuance to the order of this court dated 21.6.1997 the respondent State filed further affidavit on 31st July, 1997.

#. From the further affidavits which have come on record it is not in dispute that the GPSC held competitive examination under Rules 1966 for recruitment of Assistants in October, 1966, October, 1967, November, 1974, December 1976. From the affidavit of respondent No.3 and 4 it is clear that both twice appeared in the competitive examination conducted by the GPSC for recruitment to the post of Assistants but they did not succeed. Respondent No.5 was appointed in the year 1967 and after his appointment the GPSC held examination for Assistants in the year 1970 but he did not appear therein. Respondent No.6 was appointed in the year 1967, but in the year 1970 he did not appear in the examination held by the GPSC

#. The learned counsel for the petitioners urged that the very entry of respondents No.3 to 6 as Assistants in the Legal Department of the Secretariat was as a result of nepotism and favouritism. These appointments of

respondents No.3 to 6 were made dehors the Rules 1966. When the appointments of those respondents were illegal, regularization of their appointment resorting to Rule 16 of Rules 1967 is another piece of favouritisms and nepotism. These persons had sufficient opportunity to compete in the examination but in case of two respondents they failed twice and in case of other respondents they have not availed of that opportunity. Regularization of the services of these persons on the post of Assistant under rule 16 of the Rules 1967 cannot be said to be in the interest of public service. They were not only given higher seniority, but as a result thereof they have stollen march over the rights of the petitioners for appointment by promotion to the next higher posts. It is not a matter of promotion to the post of Section Officers, but in the Legal Department, there are few chances of promotion to the next higher post, and as these four persons have been placed above the petitioners their future prospects of promotion are completely being affected.

#. Lastly the learned counsel for the petitioners submitted that even if these persons were given temporary appointment till regularly selected candidates from GPSC are made available that is understandable, but continuation of these persons after availability of selected candidates is in contravention of rules. Another contention has been raised by the counsel for the petitioners that before regularization of services of respondents No.3 to 6 the State Government has consulted the Public Service Commission and the Gujarat Public Service Commission has specifically declined to approve their demand. So the action to regularize the appointments of the respondents No.3 to 6 under impugned order is bad in law. In support of his submissions, the learned counsel for the petitioners placed reliance on the following decisions:

- (i) AIR 1994 SC 1808 - J & K Public Service Commission etc. v. Dr.Narinder Mohan and Ors. etc. etc.
- (ii) AIR 1996 SC 2775 - Dr.Surinder Singh Jamwal & Anr. v. State of Jammu & Kashmir & Ors.
- (iii) 1997(1) SCC 245 - Union of India & Ors. v. Mahender Singh & Ors.

##. Mr. S. N. Shelat, Additional Advocate General, appearing for the State of Gujarat, contended that the

State Government has power to regularize such appointments under Rule 16 of the Rules 1967, and that power is not subject to judicial review of this court merely because the petitioners who got birth in the Department much after the entry of respondents in the Department have chosen to challenge the orders after considerably long delay. Rule 16 of the Rules 1967 gives sufficiently wide powers to the State Government to regularize any appointment where it is considered to be in the interest of public service. Mr. Shelat submitted that all these respondents are law graduates and when their appointments were made as Legal Assistants, sufficient number of law graduates were not available and therefore it was thought in the interest of public service to regularize their appointment by resorting to Rule 16 of Rules 1967. It is contended that the matter of regularization of services of these persons were taken upto the higher level in the Government, and after examining all the aspects of the matter this decision has been taken. It is urged that these persons were already working for years together, and gained sufficient experience in the Department, and therefore if exemption is given to them from appearing in the examination, no illegality is committed by the respondents. Lastly, it is urged that these respondents are in service for last about 30 years and equity demands that this Court may not interfere with the impugned orders. In support of his contentions learned counsel Mr. Shelat has placed reliance on the following decisions:

- (i) XVIII GLR 814 - Naroda Nagar Panchayat,
Ahmedabad v. State of Gujarat & Ors.
- (ii) JT 1997(2) SC 385 - State of Andhra
Pradesh & Anr. v. Dr. Rahimuddin Kamal.
- (iii) 1994(4) SCC 269 - Indian Nut Products &
Ors. v. Union of India & Ors.
- (iv) JT 1990(1) SCC 278 - J.C. Yadav & Ors. v.
State of Haryana & Ors.

Concluding the arguments the learned Additional Advocate General urged that after so many years and more so when these private respondents have settled in their life, even if the impugned orders are held to be illegal same may not be quashed and set aside.

##. Smt. Ketty Mehta, learned counsel appearing for respondents No.3 to 6 has adopted the arguments advanced by the learned Additional Advocate General.

##. In the rejoinder the learned counsel for the petitioners submitted that the respondents have failed to produce any record or material whatsoever to show that at the relevant time there were dearth of law graduates. It has next been contended that length of service is not at all relevant consideration for regularization of services of persons who have been illegally inducted in the department. He placed reliance in support of this contention on the decision of this Court in special civil application No.4890/83 and cognate matters decided on 29th January, 1997. It is further contended that the question of equity does not arise in favour of the respondents. In the present case, none other than the Legal Department has made illegal induction of the respondents No.3 to 6 and further they were continued in the services for years together despite of the fact that the selected candidates were made available by the GPSC and in such case if lenient view is taken then there will be no end to such illegal appointments. In support of this contention the learned counsel for the petitioners placed reliance on the decision of the Hon'ble Supreme Court in the case of Ahmedabad Municipal Corporation v. Virendra Kumar Jayantibhai Patel, reported in JT 1997(7) SC 14. The counsel for the petitioners submitted that merely because decision has been taken by the Government it is not immune from judicial scrutiny by this Court under Article 226 of the Constitution of India. Lastly, it is urged that there is no delay in approaching to this Court by petitioners immediately after accrual of cause of action to them.

##. I have given my thoughtful consideration to the respective contentions made by the learned counsel for the parties.

##. On 21st June, 1997 this Court directed the respondent State Government to make statement on the points given in the order. The respondent State filed affidavit and stated that respondents No.3, 4 and 5 were appointed on 16.2.1965, 11.3.1966 and 15.5.1967, on their names having been sponsored by the Employment Exchange, Ahmedabad. Respondent No.6 was appointed on 14.8.1967. In the affidavit it is admitted that the record of the year 1965-66 as regards the requisition made to the employment exchange is not available. In the year 1967 requisition was stated to be made twice, out of which only one requisition is said to be available on record. In the year 1967 it appears that requisition was sent for five posts. In the reply to question No.3 the respondents stated that appointment of respondent No.6

was made by selection committee constituted of three members named in the affidavit. These three members were two Deputy Secretary of the Legal Department, and one Under Secretary of the same Department. However, the respondents have not stated that appointment of respondents No.3, 4 and 5 were made after selection made by the Selection Committee. Reply is given only as regards to the selection of respondent No.6 as it comes out from the reading of this affidavit. The fourth question which has been formulated by this court calling for reply from respondents is relevant and I consider it to be proper to reproduce the same here:

"How many law graduates were recruited by the GPSC in the year 1965, 1966, 1967 and 1971. As per the respondent's reply, selection was also held by GPSC for these posts in the year 1970 and as such it has to be informed as to how many persons with qualification of Law Graduation were selected in that year?"

Reply has been given that prior to 1992 recruitment of Legal Assistants for Legal Department was made by General Administration Department through the GPSC and, therefore, Legal Department has called for information from G.A.D. G.A.D. informed the Legal Department by its letter dated 16.7.1997 that the required records of the year 1965 to 1971 are not available, and it is not possible to furnish the said information. It has further been stated that the Legal Department also called for information from the GPSC by its letters dated 11.7.1997 and 19.7.1997, but the information is still not received. Questions No.6 and 7 are also very relevant and I consider it proper to reproduce the same here:

"(6) Admittedly these private respondents were not successful in the competitive examinations held in the year 1966 or 1967. Then why their services were not terminated. The reasons may be given in this respect.

(7) Despite non-selection, how they were continued in service is a matter to be explained."

With reference to these two question the reply given is also very relevant and I am constrained to say that the respondents have purposely not given reply to the material part of the questions under the pretext that the relevant record is not available with the Legal Department, and therefore it is not possible to know as

to whether the question of terminating services of respondents was considered or not after respondents No.3 and 4 were declared unsuccessful in the competitive examination held by the GPSC in the year 1966 or 1967, or as to why their services were not terminated and how they were continued in service. To avoid giving reply to these vital questions the respondents in the affidavit reiterated that these persons were appointed in the Legal Department through employment exchange as sufficient law graduates were not available at the relevant time for the post of Assistants on the legal side of the Legal Department. The purpose and intention behind such appointments were given out that the Government work should not be hampered or adversely affected and further the Government work should not suffer because of the posts of Assistants remaining vacant. So further impression has been given out that as sufficient number of law graduates were not available and the work of Legal Department may not suffer, possibly their services would not have been terminated or they would have been continued.

On the record of this special civil application letter of the GPSC dated 30th July, 1997 has been produced by the respondents. The GPSC has written this letter to the Secretary, Legal Department, in response to their letter dated 19th July, 1997. A statement has also been attached to this letter. The GPSC has also shown its inability to give out that in the selection which has been held in the years given in the letter how many law graduates applicants were there. The GPSC stated that all the relevant record has been forwarded to G.A.D. at the relevant time. So G.A.D. has not given any information to this court, and GPSC in its turn has stated that the record is with G.A.D. From the statements enclosed to the said letter it is clear that in the year 1965 as many as six law graduates were recommended for appointment on the post of Legal Assistants. In the year 1966, 125 candidates were recommended, out of which five were stated to be law graduates. In the year 1968, 51 candidates were recommended out of which three were stated to be law graduates. In the year 1971 selections were held by the GPSC and as many as 17 candidates were recommended for appointment, out of which only one is stated to be law graduate. Respondents No.3 to 6 admitted that - (1) respondent No.3, i.e. B. G.Trivedi had appeared in the examination held by the GPSC for selection to the post of Assistant twice; Respondent No.4 Mr. V. M. Pancholi had also appeared twice before the GPSC for selection, but both failed. Respondents No.5 and 6 have never

appeared in the GPSC examination for their selection to the post of Assistant. Respondents No.5 and 6 have also filed affidavit on record and they admitted that in the year 1970 the GPSC held the competitive examination for the post of Assistants, but respondent No.5 had not appeared in the examination due to ill health. Similarly statement has been made by respondent No.6 that she could not appear in the examination in the year 1970 as her baby's condition was abnormal. So the resultant position is that respondents No.3 and 4 appeared before the GPSC twice, but they failed; and respondents No.5 and 6 never appeared in GPSC examination. (emphasis supplied)

##. During the course of dictation of the judgment in this case, I again felt it necessary to get certain more information from the Government on some points. On 29th November 1997, I ordered the State Government to give information on the points namely, (i) when the requisition for the recruitment to the post of Assistants in the Departments of Sachivalaya, in response to which the competitive examination for recruitment to the post of Assistants in the Departments of Sachivalaya was held in October 1965, was sent to the GPSC, (ii) when the requisition for recruitment to the post of Assistants in the Departments of Sachivalaya in pursuance of which the competition examination was held in October, 1966, was sent to the GPSC, (iii) how many sanctioned posts of Assistants were there in the Legal Department of the Sachivalaya in the years 1966 and 1967 and how many vacancies were available in these two years, (iv) in the recruitments which have been made in the years 1965, 1966 and 1967, 6, 5 and 3 law graduates respectively were recommended by the GPSC for appointment to the post of Assistants, and the Government was directed to disclose where those persons have been given the appointments. (v) In reply affidavit, in para-2 thereof, the respondent-State has come up with a case that due to non availability of law graduates in sufficient number through the GPSC, the State Government had, in consultation with the GPSC, appointed the respondents No.3 to 6 as Assistants through Employment Exchange between 1965 to 1967, but relevant material was not produced on record of this Special Civil Application, and as such, the State Government was directed to produce on record of this Special Civil Application, the relevant papers of the consultation with the GPSC of the appointments of the respondents No.3 to 6 as referred in the reply, (vi) the State Government was further directed to produce on record of this Special Civil Application, the appointment orders of respondents No.3 to 6, (vii) the learned counsel for respondents No.3 to 6 was also

directed to produce on record of this Special Civil Application the appointment orders of respondents No.3 to 6 as well as the orders of extension of their services, if any.

##. In response to the said order, the learned counsel for respondents No.3 to 6 has not produced anything on record of this Special Civil Application. (emphasis supplied). However, on behalf of the State of Gujarat, an Affidavit of Mr.V.M.Kothare, Deputy Secretary, Legal Department of the Government of Gujarat, sworn on 17th day of December 1997, has been produced on record which is at page No.125 of the paper book. The contents of the Affidavit are to be taken briefly, which are as under:

In October 1965 and October 1966, requisitions were sent to the GPSC by the General Administration Department. Vide communication dated 12.12.97, the GPSC has furnished information to the effect that in October 1965, requisition for six posts was submitted for appointment to the post of Legal Assistants. On 21st October 1965, the GPSC had recommended six candidates for appointments. After their training these candidates were offered appointments in the Legal Department. (Emphasis provided).

The General Administration Department has stated that inspite of their serious efforts to submit the required information they could not do so for want of record as the subject matter of the present case is approximately 30 years old. The Legal Department is not possessed of the communication regarding sanctioned posts for the period 1967 to 1968, but there were 26 permanent sanctioned posts of Assistants and 7 temporary posts. There is no record available with the Department to find out as to how many posts of Assistants were vacant during this period.

Then the details are given that in the year 1965, six law graduates were selected and all were given appointments in the Legal Department. In the year 1966, though five law graduates were selected for the post of Assistants, not a single candidate has been given posting in the Legal Department, and in the year 1967, though three law graduates were selected for the said post, two have been given appointments in the Legal Department. (emphasis supplied). For the years 1965, 1966 and May 1967, record is not available with the Department as regards the requisition made to the Employment Exchange. The record so far as Smt.N.S.Shah is concerned, is available. Files relating to appointments of respondents No.3 to 5 are not

available and the letters of appointments offered in favour of respondents No.3 to 5 are not available with the Department.

##. From the Affidavit aforesaid, it is clearly borne out that on all material points, the respondent-State has tried to conceal the facts from this Court. The papers relating to consultation with the GPSC and the appointments of respondents No.3 to 6 have not been produced nor any reply has been given to the question by the State in the Affidavit filed, which is at page No.125 of this Special Civil Application. From this Affidavit, it turns out that requisition has been made to the Employment Exchange for calling the names for appointments to the said post in the Legal Department on 7th July 1967 and in response to the said requisition, Smt.N.M.Chokshi, the respondent No.6 herein has been appointed. Though in the reply it is stated that the said appointment of respondent No.6 has been made in consultation with the GPSC, nothing has been produced on record to that effect and further it is also not there in the appointment order of that lady. From the appointment order of one of the private respondents, namely respondent No.6, produced on record of this Special Civil Application, which is at page No.131, it is clear that she has been given appointment purely on ad hoc and temporary basis, subject to specific conditions, that her appointment is liable to be terminated at any time without (i) any notice and (ii) assigning any reason. On the record of this Special Civil Application from the side of the State Government, no order whatsoever has been produced under which the temporary appointments of these private respondents were extended from time to time. Not only this, on the record of this Special Civil Application, the respondent-State has not produced any material to show what were the compelling reasons for the State Government to continue the temporary appointments of these private respondents, particularly when the selected candidates from the GPSC were made available and further when the private respondents No.3 & 4 have twice been rejected by GPSC for the same post and respondents No.5 & 6 have not even chosen to appear in the competitive examination held by GPSC for the said post.

##. Before proceeding to examine the contentions raised by the learned counsel for the parties, I consider it to be appropriate to briefly have a glance on the relevant provisions of the Rules 1966 and the Rules 1967. Both these Rules have been framed admittedly under Article 309 of the Constitution of India and the same are statutory rules. Under the Rules 1966, recruitment to the post of

Assistants of all Departments in the Secretariat, including the Legal Department, has to be made through the GPSC as there is a common examination provided for all such posts. From the Rules 1966, it is clearly borne out that the posts of Assistants is a common post in all the Departments of the Secretariat. So there is no separate post of Assistants in the Legal Department of Sachivalaya. The respondent-State, in its reply-affidavit, which is at page 55, has admitted the aforesaid position. The respondent-State stated that the Assistants in the Legal Department are required to be law graduates and hence from amongst the selected candidates, those who are law graduates are posted in the Legal Branch in the Legal Department. So from this statement of fact, as made out by respondent-State, it only turns out that the post of Assistant is common in all the Departments of Sachivalaya and further that out of those selected candidates who are law graduates, are posted in the Legal Department. Rule 16 of Rules 1967 is the relevant rule for the purpose of deciding this Special Civil Application and as such, I consider it to be appropriate to reproduce the same, which reads as under:

16. Appointment by relaxation of rules:

Notwithstanding contained in these rules,
the State Government may in the interest
of public service :-

- i) fill up a post by appointment of an
officer of Defence Service or All India
Service.
- ii) make appointment to any service or post
by a method other than that prescribed
under these rules; or
- iii) relax any of the provisions of these
rules;

Provided that where the appointment to
any service or post is to be made in
consultation with the Commission, not
such appointment or relaxation under
clause (ii) above shall be made except in
consultation with the Commission.

Rule 16 of the Rules 1967 provides that the State Government may, in the interest of public service (emphasis provided) make appointment to any service or post by a method other than that prescribed under these

Rules or relax any of the provisions of these Rules. The proviso however puts an obligation on the State Government that where the appointment to any service or post is to be made in consultation with the Commission, no such appointment or relaxation under clause (ii) above shall be made, except in consultation with the Commission. From the reply of the respondent-State, it is an admitted case that the appointments of the respondents No.3 to 6 which were dehors the Rules 1966 were regularized by resorting to the provisions of Rule 16 of the Rules 1967. In the reply, it is also an admitted fact that Mr. N.V.Shah, the then Deputy Secretary in the Legal Department, Government of Gujarat, is the father of respondent No.6 herein.

##. The learned Additional Advocate General has given out the reasons which were considered to be sufficient to regularize the irregular services of respondents No.3 to 6 in the interest of public service, under rule 16 of the Rules 1967, which are as under:

- (i) The respondents No.3 to 6 are law graduates.
- (ii) They are working since last many years.
- (iii) There was a dearth of availability of law graduates.
- (iv) The decision to regularize their service was taken up at the level of Secretary of the Legal Department.

##. In para 12(e) of the reply, the State Government has come up with the case that the qualification prescribed for the post of Assistant in the legal side of the Legal Department was law graduate at the relevant time. The justification given out for regularizing the services of respondents No.3 to 6, in fact, proceeds on the basis that the qualification prescribed for the post of Assistants in the legal side of the Legal Department is law graduate, which is clearly borne out from the reply aforesaid of respondent-State. I am constrained to observe that Mr.V.M.Kothare, Deputy Secretary to the Government of Gujarat, Legal Department, who filed this Affidavit, has made a statement in the reply which is contrary to the Rules 1966 framed under Article 309 of the Constitution of India, for recruitment to be made on the post of Assistants in the Departments of Sachivalaya. Mr.Kothare, before making this statement, has not looked into the relevant Rules. Rules 1966 which provide that to be eligible for appointment by direct selection to the

post of Assistant in the Departments of Secretariat, a candidate must have a degree in Arts, Law, Science, Agriculture or Commerce of a recognized University or possess an equivalent qualification. So it is incorrect to say on the part of the State government that for the appointments to the post of Assistant in the Legal Department of Sachivalaya, the minimum qualification required was LL.B. at the relevant time. This Affidavit is filed as if the said post in the Legal Department of Sachivalaya is a different post than the post of Assistants in other Departments of Sachivalaya. As stated earlier, the post of Assistant is a common post in all the Departments of the Secretariat and there is a common recruitment for this post, which is made by the GPSC at the relevant time though it is understandable that out of the selected candidates, law graduates are preferred to be posted in the Legal Department of Sachivalaya. Merely because the law graduates were preferred to be posted in the Legal Department, it is difficult to accept and the same cannot be accepted that the qualification for appointment for the post of Assistant to be posted in the Legal Department should have been only law graduate. Even a non law graduate could have been posted in the said Department as the Rules of 1966 nowhere put any such bar. It is only for convenience that the law graduates are preferred to be posted in the Legal Department of Sachivalaya, but it is not the mandate of the Rules 1966. The Addl. Advocate General, Mr.S.N.Shelat has put much emphasis on the proviso under sub rule 3 of rule 2 of Rules 1966. This proviso provides that the upper age limit should be relaxed upto 30 years for recruitment of law graduates on the post of Assistants in Legal Section of Legal Department and in Gujarat Legislature Secretariat. This proviso provides that where only law graduates are to be taken for the post of Assistant in Legal Section of the Legal Department, there may be age relaxation to the extent provided therein, but it cannot be read in the rule that LL.B.. is the qualification for the post of Assistant. The Rules 1966 have to be read as a whole and this proviso if read and given effect to as it is sought to be given by Mr.Shelat then it will render main Rules nugatory. At the cost of repetition, it is stated that the post of Assistants in the Secretariat is a common post for all of its Departments and the recruitment which has been made by the GPSC is also of the candidates who are possessing degree in Arts, Law, Science, Agriculture or Commerce or equivalent degree. On the record of the Special Civil Application, nothing has been produced from the side of the State Government to show that for the recruitments which have been made on the post of

Assistants in the years 1965, 1966 and onwards, only law graduates were called upon to make applications. I consider it to be fruitful to make reference here to the Rules, namely, Legal Assistant in the Subordinate Secretariat Service Recruitment Rules, 1992 (hereinafter referred to as the 'Rules 1992'). These Rules have been framed under Article 309 of the Constitution and were published in the Gujarat Government Gazette on 12.3.92. From these Rules, it is now clear that from 12th March 1992, the post of Assistant on the legal side of the Legal Department was made a separate post and separate Rules have been framed for recruitment to be made on these posts. This post has now been given the name of Legal Assistant and so from 12th March 1992, the post of Assistant has now become legal Assistant on the legal side of the Legal Department of Secretariat and as such this post has been taken away from the purview of Rules 1966 and after 12th March 1992, separate recruitment has to be made for the post of Legal Assistant on the legal side of the Legal Department and for which the qualification prescribed is of law graduate, but still the selection has to be made through the GPSC, as it is clearly borne out from rule 2 of these rules. The Rules 1992 aforesaid makes it clear that before 12th March 1992, the post of Assistant in all the Departments of the Secretariat inclusive of the Legal Department was a common post and common recruitment was made by GPSC and the minimum qualification prescribed for the said post was degree in Law, Arts, Science, Agriculture or Commerce of recognized University or an equivalent qualification. So the very basic fact on which defence has been made out in the reply by the State Government is not correct.

##. The post of Assistants in the Legal Department, at the relevant time, was under the purview of the GPSC and the temporary appointments which have been given to the respondents No.3 to 6, though it is not stated in the order, should have been liable to be terminated on availability of selected candidates by GPSC. This condition, in such appointment, has to be considered as in-built condition. Reference to the relationship of one of the respondents, the respondent No.6 herein with the then Deputy Secretary of the Legal Department cannot be said to be altogether irrelevant or superficial. Though any defence can be taken, but in the facts of this case, the presence of father of respondent No.6 as a Deputy Secretary in the Legal Department of the Government of Gujarat cannot be altogether ignored and said to be of no consequence. This aspect has relevance in the facts of this case and in case the petitioners have come up with this apprehension that possibly that person may be

instrumentality in getting his daughter appointed on the post of Assistant in the Legal Department dehors the Rules altogether cannot be said to be unfounded or baseless.

##. The other aspect of the matter of which serious notice has to be taken is that the respondent-State, despite of direction given by this Court, has tried to suppress many of the important and relevant facts before this Court pertaining to induction of respondents No.3 to 6 in the Legal Department on the post of Assistant dehors the Rules. Any defence can be taken but while giving the defence, the respondent-State has forgotten that this defence are too difficult to be accepted from its side. Defence such as non availability of record or non traceability of record or that record is with General Administration Department or information is available with GPSC or vice-versa etc. goes to show that the respondent-State has tried to play the game of hide and seek before this Court with the clear object and purpose to justify its own orders which have been impugned by petitioners in this Special Civil Application. Even the respondents Nos.3 to 6 have not produced any record pertaining to their appointments on the post of Assistant.

##. On the record of this Special Civil Application, there are extracts of the Gujarat Government Gazette dated April 28, 1966 and 20th June 1967. These Gazettes pertain to the declaration of results of competitive examination for recruitment to the post of Assistants in the Departments of Sachivalaya of the Government of Gujarat and allied offices, held in October 1965 and October 1966 (viva-voce test having been completed on 21st April 1966 and on 16th June 1967 for the examination held in October 1965 and October 1966 respectively). In response to the first declaration of result of competitive examination, recommendations have been made of 125 posts of Assistants by the GPSC to the Government, on 24th July 1997, as it turns out from the letter of GPSC dated 30th July 1997, and out of these 125 candidates, five were law graduates. In response to the second declaration of result, the recommendation appears to have been made on 27th March 1968 of 51 candidates out of which three were law graduates.

##. The respondent-State, in its reply admitted that GPSC had held examination for 60 posts of Assistants in the year 1966 and for 51 posts in the year 1967 to be appointed in different Departments of Secretariat. From the letter of GPSC dated 30th July 1997, one thing which

also turns out is that the GPSC had sent a list of selected candidates for the post of Assistants on 31st December 1965 and in that list, six law graduates were there. So if we go by these facts, the resultant position which comes out is that on or after 31st December 1965, six law graduates, on or after 24th July 1967, five law graduates and on or after 27th March 1968, three law graduates were made available by GPSC for making appointments in different Departments of Sachivalaya inclusive of Legal Department. Recommendations have been made on 31st December 1965 by GPSC of 60 candidates to be appointed on the post of Assistants in different Departments of Sachivalaya and as such, it is borne out from this fact that the requisition would have been sent by the Secretariat to the GPSC for making selection in early 1965. Similarly, from the Gujarat Government Gazette Notification dated April 28, 1966, it is clear that the written test for selection to be made on the post of Assistants in the Departments of Sachivalaya was held on October 1965. So the requisition would have been sent by Sachivalaya to the GPSC in or around early 1965 or may be in 1964. Similarly, from the Gujarat Government Gazette Notification dated 29th June 1967, it comes out that requisition for the post of Assistants to be recruited in different Departments of Sachivalaya would have been sent in the early 1966 or 1965. Though the State Government has not produced all the relevant material regarding requisition which has been sent to the Employment Exchange for calling of the names of candidates for making temporary appointments on the post of Assistants in the Legal Department, but from the Affidavit which has now been filed, it comes out that requisition has been sent in July 1967, in response to which the appointment of respondent No.6 has been made. Requisition has been sent for five posts as it appears from the document filed at page 130. If we go by this requisition slip as well as the letter of GPSC, it is difficult to understand that when the requisition has already been sent to GPSC for making selection of candidates to be appointed on the posts of Assistants in the Departments of Secretariat and when the GPSC has already held the written test in October 1966, and interviews on 16th June 1967, and when the result has already been declared on 29th June 1967, what was the necessity for sending this requisition for making temporary appointments to the Employment Exchange as the selected candidates by GPSC would have been available by that time. It is not out of context to state that in the list of selected candidates which has been sent by GPSC to Sachivalaya on 24th July 1967, as many as five law graduates were there. Similarly, the respondent-State

has conveniently not produced on the record of this Special Civil Application, the dates on which requisition has been sent for calling the names to the Employment Exchange for making temporary appointments on the post of Assistants and in response to which the private respondents No.3 to 6 have been appointed. However, if we go by the dates of their appointments, it is clearly borne out that at that time also the matter of recruitment to be made through the GPSC was already in process. The requisition, as it comes out from the Affidavit of the respondent-State which is at page 125, was sent in the month of July 1967 and how expeditiously the matter has been processed is borne out from the fact that the Employment Exchange has also sent on its turn, the names immediately on 11th August 1967, and the respondent No.6 herein has been given appointment on 14.8.67. The respondent No.6 is none other than the daughter of the then Deputy Secretary, Mr.N.V.Shah in the very Department. As per the case of respondent-State, the dates of appointments of respondents No.3 to 6 on temporary basis on the post of Assistants are as under:

Respondent No.3 : 16.2.65

Respondent No.4 : 11.3.66

Respondent No.5 : 15.5.68

Respondent No.6 : 14.8.67

If we go by the dates of the appointments of these respondents, I am of considered opinion that things have been moved in such a way that these persons would have been inducted in services without waiting for the result of the GPSC. At the cost of repetition, I may state that on 16.2.65, there was all possibility that the matter would have been there with the GPSC for making selection on the post of Assistants in the different Departments of Sachivalaya and that is the reason that the respondent-State has very conveniently withheld the information from this Court as to on which date requisition has been sent to the GPSC in response to which the recommendations have been made by GPSC on 31st December 1965. Similarly, on 11.3.66, when the respondent No.4 has been appointed, the requisition for selection to be made on the post of Assistants in the Departments of Secretariat was with the GPSC and the GPSC had already started the process of selection and written test was held on October 1965 and viva-voce test was also completed on 21st April 1966. So it is difficult to understand what was the hurry and necessity for making such temporary appointments and in absence of any reasons put forth by respondent-State, the only inference is that these appointments speak of favouritism and nepotism.

Similar, is the case with the appointment of respondent No.5, where on the day on which she has been appointed, in fact, the result of GPSC for making selection on the post of Assistants in the Departments of Sachivalaya has already been declared and after declaration of result by GPSC it is clear that the select list was likely to come within short period, but as she has not appeared in the competitive examination, to appoint her, she has been given temporary appointment by resorting to the method of sending requisition to the Employment Exchange. That appointment is also nothing but only a back door entry in the services which is clearly borne out from the facts. So far as the respondent No.6 is concerned, it is a clear case where despite of availability of selected five law graduates by GPSC, she has been given appointment. So all these facts speak of favouritism and nepotism. It is really shocking that in the year 1966, as per the respondent's own case, five law graduate candidates selected by GPSC were available, but not a single candidate has been posted in the Legal Department. This fact is clearly borne out from the statement made by respondent-State in the Affidavit at page No.126. The very fact that in the year 1966, five selected law graduates by GPSC were available and not a single person has been appointed in the Legal Department, goes to show that deliberately vacancies have been kept for making appointments of these private respondent on temporary basis. In the year 1967, three law graduates selected by GPSC were available and only two have been posted in the Legal Department. When three selected candidates were available and out of which two had been appointed, I fail to see what for these two respondents, namely respondents No.5 and 6 have been given appointments. More so, when it is not the case of respondent-State that even after adjusting these two persons, still vacancies were available. The respondent-State has again, I am constrained to observe, deliberately not given out as to how many vacant posts were available in the relevant years when the respondents No.3 to 6 have been given appointments on temporary basis.

##. Much emphasis has been put by the learned Addl. Advocate General on the ground that there was dearth of law graduate candidates. Leaving apart the question that law graduate was not the minimum qualification prescribed for the post of Assistant in the Legal Department, from the facts which have come on record, it is clear that in the year 1965, 1966 and 1967, six, five and three law graduates, i.e. fourteen in all, as per the letter of GPSC, were available. In the year 1968, three law graduates were there who have been selected on the said

post but still the services of respondents No.3 to 6 have not been terminated. So on availability of law graduate selected candidates in the Legal Departments, the services of none of these private respondents has been terminated.

##. It is not the case of dearth of law graduate candidates. It is a case where the respondents No.3 and 4 admittedly have taken chances twice before GPSC of their selection and both of them have not been selected and curiously enough, even after availability of selected candidates by GPSC, with qualification of LL.B., their services have not been terminated and they have been continued. This fact goes to show that these appointments were nothing but only back door entries and these private respondents were the favourite persons and things have been so manipulated that despite of availability of selected candidates with qualification of LL.B.. and despite of the fact that the respondents No.3 and 4 have twice failed in the examination held by GPSC, they have been continued and though the respondents No.5 and 6 have not appeared in the said examinations, they have also been continued.

##. It is a settled law that after availability of selected candidates from Public Service Commission, for the posts on which recruitments have to be made through the Public Service Commission, the temporary appointments made on the said posts should have been discontinued. That has not been done in the present case. So the first ground which has been raised by learned Addl. Advocate General, in support of his contention that Rule 16 of the Rules 1967 has been correctly made applicable to the cases of respondents No.3 to 6, as there was dearth of law graduates does not stand to any logic or any ground. There was no dearth of law graduates, but on the contrary, the matters were pending for selection before GPSC and sufficient number of law graduate candidates were made available by GPSC and still these respondents No.3 to 6 have been appointed dehors the Rules and further, the worst part is that two of them have been rejected by GPSC twice and two others have not taken chance, and they were continued for the years. The respondents No.3 and 4 were law graduates but they could not stand to the competition in GPSC then how far it is correct to say on the part of the State Government that there was dearth of availability of law graduates. The law graduates were available, but it is a different matter that they were not selected and non selection of these two persons by GPSC how far justifies to continue them in service and to the extent of ultimately

regularizing their services by resorting to Rule 16 of Rules 1967. Similar is the case with respondents No. 5 and 6. Selected law graduates in number five and three were available at the relevant time but still these persons have been given appointments and further continued as temporary appointees.

##. The above plea also does not stand to any test of reasonability or rationality. It is understandable that the minimum qualification for appointment to the post of Assistants in the Legal Department of Sachivalaya would have been only law graduate, but that is not the actual position. As per Rules 1966, the minimum qualification for the making appointments on the post of Assistants in Departments of Sachivalaya, including of the Legal Department was degree in Law, Arts, Science, Agriculture, Commerce, or its equivalent, and when the number of selected candidates were available, may not be with the qualification of LL.B., these temporary appointees should have been replaced by selectees. It is understandable that the law graduates are preferably posted in the legal side of the Legal Department, but it is not the requirement of the Rules of 1966. Even if it is taken for the sake of argument that sufficient number of Law graduate candidates were not there on the merit list prepared by the GPSC, still the continuation of these four respondents despite of the fact that selected candidates by GPSC have been made available in sufficient number for the post of Assistants was illegal, unjust, unfair and arbitrary.

##. The other ground given that these respondents were continued to work in the Department for years and they gained experience and the same has been taken to be a good ground for regularizing their services in the interest of public service, it is suffice to say that this ground can hardly be a ground much less a good ground for regularizing the services of these respondents in the interest of public service.

##. The respondent-State has not disclosed the facts as to what were the reasons to continue these four persons in service on temporary basis despite of the fact that the respondents No.3 and 4 were twice rejected by GPSC and respondents No.5 and 6 have not appeared in the examination held by GPSC and candidates duly selected by GPSC, both law graduates as well as graduates were available in the years 1965, 1966, 1967, 1968 and onwards. Despite of availability of sufficient number of selected candidates their services were not terminated and they continued. It is necessary to mention here that the

State Government has not produced on record of this Special Civil Application, the orders of extension of services of respondents No.3 to 6. The relationship of respondent No.6 with then they Deputy Secretary of the Department assumes importance and as stated earlier, there may be all the possibility of said person being instrumentality in continuing these respondents in service. It is a different matter that the petitioners are unable to disclose the other persons who are the supporters of these respondents, i.e. respondents No. 3 to 6, but in the facts and circumstances of the present case, it can easily be inferred that there were the persons who were supporting these respondents in the Department. Continuation of these persons in these facts and circumstances on temporary basis on the posts of Assistants in the Legal Department of Sachivalaya is wholly arbitrary and unjustified and this illegal and arbitrary action of the respondent-State will not be permitted to culminate in favour of private respondents to the extent of conferring them the benefits under Rule 16 of the Rules 1967 of regularizing their services in the name of "in the interest of public service". How far it can be said to be in the interest of public service to regularize the services of these respondents who have been appointed dehors the rules and despite of the fact that two have been rejected twice by GPSC and two have not appeared in the examinations held by GPSC and they were continued in services and their services were not brought to an end and still it was taken to be a case where provisions of Rules 16 of Rules 1967 have to be resorted. It is a case where powers conferred on the controlling authority under Rule 16 of the Rules 1967 have been exercised for the purpose of regularizing the appointments which were dehors the Rules. Atleast, continuation of these persons in service after rejection of two of them by GPSC and two have not even appeared, on availability of selected candidates was illegal and arbitrary and the benefit of the same could not have been given to the respondents No.3 to 6. I consider it to be fruitful to make a reference here to the Division Bench decision of this Court in the case of Mukesh B.Desai v. State of Gujarat & Ors., reported in 1997(3) GCD 645 (Guj) wherein this Court held:

The appellants are persons who, having failed to get selected for appointment as Lecturers pursuant to the selection having been made by the GPSC and even having failed to get on to the waiting list, still want to continue to serve as Lecturers merely because they had, at one time, been appointed as such on ad hoc basis. Not only

this, the appellants are general category candidates and they want to continue as ad hoc Lecturers against the reserved post.

##. Rule 16 of the Rules 1967 provides that where appointment to any service or post is to be made in consultation with the Commission, no such appointment or relaxation under clause (ii) thereof shall be made except in consultation with the Commission. The learned Addl. Advocate General contended that consultation does not mean approval of GPSC of regularization of appointments of respondents No.3 to 6, and he placed reliance upon certain authorities of Hon'ble Supreme Court in support of his contention. It is true that consultation may not mean to be approval, but nevertheless when the Rule is specifically contemplating that the GPSC has to be consulted, then in view of the provisions of the nature as contained in Rule 16 of the Rules 1967, it could not be taken to be only a formality. However, in view of the fact that otherwise also, I do not find that the decision taken by the State Government to regularize the services of respondents No.3 to 6 under Rule 16 of the Rules 1967 can be said to be in interest of public service, I do not consider it to be appropriate to proceed to examine this contention any more.

##. Long continuation of temporary appointee may not be a good consideration for regularizing his services on a post which is within the purview of GPSC. Here, reference may have to the decision of the Hon'ble Supreme Court in the case of Dr.M.A.Haque & Ors. v. Union of India & Ors., reported in 1993(2) SCC 213. In this case, their Lordships, Supreme Court, have held that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and the bypassing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. Their Lordships, Supreme Court, have further observed that the Court, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. Their Lordships further observed that it appears that since Supreme Court has in some cases permitted regularisation of the irregularly recruited employees, some Governments and authorities have been increasingly resorting to irregular recruitments. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as

a matter of course.

##. Reference may have to another decision of the Hon'ble Supreme Court in the case of Dr.Arundhati Ajit Pargaonker v. State of Maharashtra, reported in JT 1994(5) SC 378. There the question was whether the appellant who was appointed temporarily against a permanent post was entitled to be regularised under Temporary Government Servants Extension of Permanency Resolution issued by the State Government in 1975 or under any other equitable principle as she had been working continuously since then and had worked for nine years, without break on the date the Government advertised the post to be filled through Public Service Commission. The appellant therein was appointed as a Lecturer in Dentistry at the B.J.Medical College, Pune, on 16th September 1978, on purely temporary basis pending further orders. The appointment of the appellant therein was subject to termination without any notice and without any reason being assigned. In March 1988, the post which the appellant was holding was advertised through Public Service Commission. The appellant filed writ petition claiming that there was no vacancy as she having rendered nine years' service without break as a Lecturer she stood regularised as per the Government Resolution dated 19.9.75. Her claim was contested by the State Government on various grounds including that the petition was premature. The petition was later on transferred to the Tribunal. The Tribunal though granted interim relief in favour of the appellant, but the selection was not stayed and one Dr.Satish B. Barale was selected but he was not given appointment and as such he also filed an application petition before the Tribunal. Both these petitions came to be decided by the Tribunal and the claim of the appellant has been rejected as the benefit of resolution dated 19.9.1975 could not be extended to her. Their Lordships of the Hon'ble Supreme Court held in the aforesaid case that the claim of the appellant that as she has worked as a Lecturer without break in service for nine years on the date the advertisement was issued, she should be deemed to have been regularised is not well founded. Their Lordships, Supreme Court further held that the eligibility and continuous working for howsoever long period should not be permitted to over-reach the law. Requirement of rules of selection through Commission cannot be substituted by humane considerations. Law must take its course. The Hon'ble Supreme Court observed that the appellant was not entitled to claim that she should have been deemed to have been regularised as she had been working without break for nine years.

##. In the case of J & K Public Service Commission, etc. v. Dr. Narinder Mohan and Ors. etc. etc., reported in AIR 1994 SC 1808, their Lordships, Supreme Court have considered the matter of regularisation of ad hoc appointee, a Doctor, and I cannot do better than to reproduce the relevant observations made by the Court in this case:

"7. Existence of statutory Rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Art.162, the State can create civil posts and fill them up according to executive instructions consistent with Arts.14 and 16 of the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law. The Governor exercising the power under proviso to S.125 (Art.309 of the Constitution of India) made the rules which do not expressly give the power to the State government to make ad hoc appointments. No such rule has been brought to our notice. No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Having made the rules the executive cannot fall back upon its general power under Art.162 to regularise the ad hoc appointments under the Rules. Rule 9(3) empowers only to relax the qualification of age in particular exigencies which cannot be called in aid to relax the rules of recruitment. To tide over unforeseen exigencies, power to make ad hoc appointments may be visualised as envisaged by Explanation-b to Rule 4 but it expressly states that by virtue of such appointment, the ad hoc appointee does not become member of the service. The rule prescribes direct recruitment/ promotion by selection as the mode of recruitment which would be done only by PSC or promotion committee duly constituted and by no other body. Therefore ad hoc employee should be replaced as expeditiously as possible by direct recruits. A little leeway to make ad hoc appointment due to emergent exigencies does not clothe the executive government with power to relax the recruitment or

to regularise such appointment nor to claim such appointments to be regular or in accordance with rules. Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The latter are the products of order and regularity. Every eligible person not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments. In view of the Explanation-b to Rule 4, the ad hoc appointments to any post in any of the three wings of the service under the rules are therefore de hors the rules. Appointments of the respondents No. 1 to 6 cannot be held to be in accordance with the Rules.

.....

9. Moreover the proviso to Art.320 (proviso to S.133 of J & K Constitution), though gives power to the State Government to specify case of class of cases in respect of which consultation with the PSC may be dispensed with still the recruitment shall be in compliance with either of the Art.320(1) and S.133(1) of the J & K Constitution or by duly constituted body or authority. The rules or instructions should be in compliance with the requirements of Arts.14 and 16 of the Constitution. The procedure prescribed shall be just, fair and reasonable. Opportunity shall be given to eligible persons by inviting application through the public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the State. Therefore, it must be held that power of relaxation exercised by the Government is ultra vires the Rules and the High Court is right in holding that Government cannot relax the rules of recruitment to be made by the PSC. Government have no power to make regular appointment under the Rules without selection by the Public Service Commission under S.133(1) read with Rule 5 and Schedule III of the Rules.

10. The next question is whether the direction given by the High Court to regularise the services of the respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1986 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely, direct recruitment or promotion by selection. As regards the Lecturers are concerned, it is only by direct recruitment. The mode of recruitment suggested by the high Court, namely, regularisation by placing the service record of the respondents before the PSC and consideration thereof and PSC's recommendation in that behalf is only a hybrid procedure not contemplated by the Rules. Moreover, when the Rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for by qualified and eligible persons and consideration of their claim to an office or post under the State is guaranteed right given under Arts.14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench is in negation of Arts.14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection, as directed by the High Court, nor be mandated to disobey the Constitution and the law."

##. Then comes the case of the Hon'ble Supreme Court in the case of Dr.Surinder Singh Jamwal & Anr. v. State of Jammu and Kashmir & Ors., reported in AIR 1996 SC 2775. The Hon'ble Supreme Court, in this case held as under:

"2. The controversy raised in this case is squarely covered by the judgment of this Court reported in J & K Public Service Commission v. Dr.Narinder Mohan, (1994)2 SCC 630: (1994 AIR SCW 1701). It is not in dispute that the appellants were recruited on ad hoc basis and have been continuing as such. it is their contention that since they had put in more than 13 years of service they are entitled to regularisation of service and approached the High Court for direction to regularise their service. The High Court has followed the ratio in the above judgment and dismissed the petition. In

the light of the judgment of this Court the settled legal position now is that the recruitment to the service should be governed by the appropriate statutory rules. Under the rules the regular recruitment to the posts shall be made by the Public Service Commission. Consequently, the ad hoc appointments would be only temporary appointments dehors the rules, pending regular recruitment without conferring any right to regularisation of service. This Court in Narinder Mohan's case (1994 AIR SCW 1701) (supra) had given the following directions:

"Accordingly, we set aside the directions

issued by the Division Bench of the High Court and confirm those of the single Judge and direct the State Government of the J & K to notify the vacancies to the PSC which would process and complete the selection, as early as possible, within a period of six months from the date of receipt of this order. The State Government should on receipt of the recommendation, make appointments in the order mentioned in the selection list within a period of two months thereafter. Since the respondents have been continuing an ad hoc doctors, they shall continue till the regularly selected candidates are appointed. They are also entitled to apply for selection. In case any of the respondents are barred by age, the State government is directed to consider the cases for necessary relaxation under Rule 9(3) of the age qualification. If any of the respondents are not selected, the ad hoc appointment shall stand terminated with the appointment of the selected candidate. The direction sought for by Dr.Vinay Rampal cannot be given. His appeal is accordingly dismissed and the State appeal is also dismissed. The appeals of the PSC are accordingly allowed but in the circumstances the parties are directed to bear their own costs."

##. In the case of Union of India & Ors. v. Mahender Singh & Ors., reported in (1997)1 SCC 245, the Hon'ble Supreme Court has observed that only on the basis of long period of service, the regularization cannot be ordered

by ordering for relaxation of age limit.

##. Further reference may have to the decision of Hon'ble Supreme Court in the case of Ram Sakhi Devi (Smt.) v. State of U.P. & Ors., reported in (1997)4 SCC 379, wherein the Hon'ble Supreme Court observed:

"6. The learned counsel for the appellant has sought to place reliance on Section 33-A of the Regulation made under Section 16-E of the U.P. Intermediate Act to regularise such ad hoc appointments. Undoubtedly, every teacher directly appointed before the commencement of the Act, in other words, on ad hoc basis, against the substantive vacancy may be regularised under Section 33-A; but it cannot be used as a routine. it is mandatory for the management to notify to the Commission and in case the Commission is unable to recommend the selected candidates within a reasonable time, any candidate appointed on ad hoc basis will be deemed to have been appointed in substantive capacity. The recourse to Section 33-A should be made sparingly and not as a routine. If the Section 33-A route is adopted as a routine, the entire process of selection contemplated under the Act would be given a decent burial and illegal appointments would gain legitimacy. Under these circumstances, we do not think that the counsel is right in contending that the appellant could be regularised under Section 33-A of the Regulation."

##. In the case of State of H.P. & Anr. v. Jafli Devi (Smt.), reported in (1997)5 SCC 301, Their Lordships of the Hon'ble Supreme Court have observed:

"4. The submission of the learned counsel is that in view of the said condition laid down in the policy framed by the State Government regarding giving appointment on compassionate grounds, Harbans Lal, the second son of the respondent, could not be given appointment in view of the fact that another son of the respondent was already in government service. it is urged that the High Court was in error in quashing the order dated 31.3.1994 passed by the director of Fisheries, which was on consonance with the aforesaid policy contained in the Office Memorandum and in directing that the case of Harbans Lal for appointment on compassionate

grounds be reconsidered. We find considerable force in this submission. In LIC v. Asha Ramchandra Ambekar ((1994)2 SCC 718) this Court has laid down that the High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration and the Court should ensure to find out whether a particular case in which sympathetic considerations are to be weighed falls within the scope of law. In that case it was held that direction for appointment on compassionate grounds could not be given dehors the provisions of statutory regulations or instructions governing such appointments."

##. Reference may have to another decision of the Hon'ble Supreme Court in the case of E.Ramakrishnan & Ors. v. State of Kerala & Ors., reported in (1996) 10 SCC 565, wherein Their Lordships of the Hon'ble Supreme Court have held:

"2. It is sought to be contended by Mr.M.M.Paikeday, the learned Senior Counsel for the petitioners that in the light of the law laid down by this Court in Piara Singh case ((1992)4 SCC 118) and in view of the fact that the petitioners have been continuing for more than 14 years, they are required to be regularised. We find no force in the contention. Admittedly, the posts are to be filled up through selection by PSC recruitment norms. Necessarily, therefore, the requisition was sent for selection through the PSC and candidates came to be selected. Under those circumstances, the candidates, who were found eligible and selected and recommended for appointment by the PSC, were required to be appointed. The Court rightly had exercised the power in declining to regularise the services of the petitioners.

3. The learned counsel sought to rely upon an order of the Government where the Government had decided to regularise the services of the ad hoc employees. Obviously, since the decision runs into the teeth of statutory requirement under Article 320 of the Constitution the Government cannot take any decision contrary to the Constitution to regularise the services of the candidates dehors the recruitment rules and the statutory process for selection thorough the PSC. The High Court, therefore, has rightly given

direction to the Government to notify 30 vacancies and odd or whatever may be the vacancies existing to fill up from amongst the candidates selected by the PSC."

##. Now, I may deal with the decisions which have been relied upon by the learned Addl. Advocate General. In the case of State of Andhra Pradesh & Anr. v. Dr.Rahimuddin Kamal, reported in JT 1997(2) SC 385, Their Lordships of the Hon'ble Supreme Court have considered the matter as to whether the non consultation of UPSC or State Public Service Commission in the case of service matters of the officers will render the action taken to be illegal. The phraseology used in Article 302(3)(c) of the Constitution has been referred and the words, "shall be consulted", used therein have been considered with reference to the Rules which were under consideration before the Hon'ble Supreme Court, and the same have been held to be not mandatory.

##. In the case of Indian Nut Products & Ors. v. Union of India & Ors., reported in (1994)4 SCC 269, Their Lordships of the Hon'ble Supreme Court dealt with the question of judicial power of review of this Court, and Their Lordships have observed:

"10. It is well-settled that if a statute requires an authority to exercise power, when such authority is satisfied that conditions exist for exercise of that power, the satisfaction has to be based on the existence of grounds mentioned in the statute. The grounds must be made out on the basis of the relevant material. If the existence of the conditions required for the exercise of the power is challenged, the courts are entitled to examine whether those conditions existed when the order was made. A person aggrieved by such action can question the satisfaction by showing that it was wholly based on irrelevant grounds and hence amounted to no satisfaction at all. In other words, the existence of the circumstances in question is open to judicial review."

##. In the case of Naroda Nagar Panchayat, Ahmedabad v. State of Gujarat & Ors., reported in XVIII GLR 814, the Division Bench of this Court has held that the words and phrases, 'consultation' as contained in Section 9(2) of the Gujarat Panchayats Act, 1962, cannot be equated with consent or concurrence. The Court has held that, "the provision as to 'consultation' contained in Section 9(2)

of the Gujarat Panchayats Act, 1962, is directory in nature and although it indicated a duty to consult the concerned Panchayats before passing an order under that Section, it does not follow that every departure from that duty would taint the whole proceedings with a fatal blemish and render it void and ineffective. There is also nothing in the Panchayats Act to show that even after consultation the sense indicated by the Panchayats concerned will be binding on the Government. The word 'consultation' cannot be equated with 'consent' or 'concurrence'. The two sets of expressions have clearly different meanings in common parlance".

##. The ratio of decisions, reliance on which is placed by the learned Additional Advocate General is that consultation with GPSC cannot be equated with consent or concurrence. The requirement of making consultation to the PSC is only held to be directory. As on this question, I do not consider it necessary to go in detail in this judgment as on merits, otherwise, the petitioners have a good case and this petition deserves to be accepted. So, I am not discussing this issue any more in this judgment.

##. In the case of J.C.Yadav & Ors. v. State of Haryana & Ors., reported in JT 1990(1) SC 278, Their Lordships of the Hon'ble Supreme Court, while dealing with Rule 22 of the Haryana Service of Engineers Class I PWD (Public Health Branch) Rules 1961, held that "the Rule confers power on the Government to dispense with or to relax the requirement of any of the Rules to the extent and with such conditions as it may consider necessary for dealing with the case in a just and equitable manner. The object and purpose of conferring this power on the Government is to mitigate undue hardship in any particular case, and to deal with a case in a just and equitable manner. If the Rules cause undue hardship or Rules operate in an inequitable manner in that even the State Government has power to dispense with or to relax the requirement of Rules. The Rule does not restrict the exercise of power to individual cases. The Government may in certain circumstances relax the requirement of Rules to meet a particular situation...." The Rule which was for consideration before their Lordships of the Hon'ble Supreme Court in this case provides that, "Where Government is satisfied that the operation of any of these Rules causes undue hardship to any particular case, it may by order dispense with or relax the requirements of that Rule to such extent, and subject to such conditions, as it may consider necessary for dealing with the case in a just and equitable

manner". The contention of the learned Addl. Advocate General, by referring to this authority, is that where the Rule gives power to the Government to relax the recruitment rules then normally this Court should not interfere in the matter and the powers exercised in favour of the employees concerned should be taken to have been exercised in a just and equitable manner.

This authority is of little help in this case to the respondent-State and the reason is very obvious. It is not a case where the Rules 1966 and 1967 are causing any undue hardship in a particular case. If the Rules cause undue hardship, or operate in an inequitable manner, in that event, the State Government has power to dispense with or relax the requirement of Rules. The present one is not the case of that nature, but it is a case where the appointments made dehors the recruitment rules are sought to be regularized on the ground which cannot be said to be justified and reasonable and in this case where it is difficult to say that regularization of services of private respondents is in the interest of public service.

##. In the Special Civil Application, the petitioners cited examples of somewhat similar cases where the State Government has not considered those to be fit cases where it has to exercise powers under Rule 16 of the Rules 1967. First in the series, reference has been made, to the case of one Shri K.C.Munia, who has not passed the departmental examination of Assistant but his services were not regularized by resorting to the provisions of the aforesaid rules. The Legal Department in his case opined that as Shri K.C.Munia failed to pass the departmental examination of Assistant, his services cannot be regularized. The petitioners submitted in the Special Civil Application that contrary to it, in the cases of these private respondents herein, the Legal Department has gone to the extent of even exempting them from passing of the departmental examination. Reference has been made to case of another person Smt.R.S.Navani who has been selected by the Public Service Commission as far back as in the year 1973 and has failed to pass the departmental examination and on this ground her services were terminated in the year 1982. That lady approached to this Court by filing Special Civil Application No.745 of 1982 and the same was rejected in view of the contention raised by the State Government therein that passing of the departmental examination is statutory requirement. Third case has been cited in the Special Civil Application of Shri T.H.Raval. Shri Raval was appointed through employment exchange as Assistant in the

office of the Law Commission and his services were required to be terminated and were actually terminated with effect from 31st December 1981. However, he was reappointed as Assistant on the legal side of the Legal Department on several conditions and some of conditions were being that he has to pass the competitive examination held by the PSC and that his appointment will be continued till the PSC approves his appointment and his services will be liable to be terminated if he does not pass the said competitive examination. The petitioners stated that the department did not exercise any such power in the case of Shri Raval though he was serving the Department for several years as Assistant and was continued on the condition of compliance of the statutory Rules, 1966.

In reply to the Special Civil Application, the State Government has come up with the defence to this point raised by the petitioners in the Special Civil Application in the manner the case of Shri K.C.Munia is urged to be not relevant and applicable. The case of Smt.Navani has been replied by the State Government in the way that she was holding the post of Stenographer and in her case the power under Rule 16 of the Rules 1967 is not exercised and that it is altogether irrelevant. In respect to the case of Shri T.H.Raval, Assistant in the Law Commission and who was subsequently given appointment in the Legal Department it is replied in terms that it is a different case and has no relevance whatsoever too the issue raised in the present Special Civil Application. The reply which has been given to the case of the petitioners in respect to the three examples given where the Legal Department dealt with somewhat similarly situated persons to the private respondents, differently. It is true that the State Government may have all the explanation for its illegal, erroneous and discriminatory actions but the Court has to consider whether the defence given to the case of the petitioners is plausible, logical and a defence of substantial nature. Merely stating that the cases of those persons are irrelevant etc. is not in fact a defence befitting to the State Government, more so when it is a welfare State. Very conveniently, the State Government has avoided to give reply to the substantial issue raised by the petitioners. The petitioners have cited the examples of the three persons in their cases, and particularly in one case where a candidate was duly selected by GPSC but merely on failure to the departmental examination her services were terminated, Rule 16 of the Rules 1967 was not resorted to and likewise it was not resorted to in two other cases also. But in the cases of private respondents, it has

gone to the extent of exercising its powers under Rule 16 though their appointments were dehors the Rules, two of them have failed in the selection held by GPSC twice and two have not chosen to apply for selection to regularize their services and further to grant them exemption from passing of the departmental examination. From these three cases cited by the petitioners, it is clear that the State Government is not dealing with the similar cases in a reasonable and fair manner even where there may have been real hard case i.e. the case where one lady was selected by GPSC but still her services were terminated merely on her not passing by her the Departmental examination and on the other hand the appointments of the private respondents dehors the rules coupled with the facts that two have failed in the selection before GPSC twice and two have not applied, still the benefit to the extent which otherwise would not have been desirable has been granted. If we go by these facts as pleaded by the petitioners in this Special Civil Application and the reply of the State Government, I feel that the plea that the private respondents are favourites of somebody in this Legal Department has sufficient merits and substance.

##. Now I may deal with another contention of the learned Addl. Advocate General that the petitioners cannot challenge the orders passed by respondent-State in favour of private respondents, when they got berth in the Department after those orders. So the contention is that after so many years of regularization of services of private respondents challenge to those orders should not be permitted at the hands of the petitioners. If we go by the facts of this case, I find that the petitioner No.1 was selected by GPSC and given appointment on 22nd November 1976, the petitioners No.2 to 5 were appointed in the year 1979, the petitioner No.6 in the year 1980 and the petitioner No.7 in the year 1981. The impugned orders have been passed on 19th February 1976 and 25th April 1978 regarding regularization and exempting the private respondents from passing post training examination and promotion orders of these respondents to the next higher posts are dated 8th August 1983 and 20th August 1983. This petition has been filed by petitioners in the year 1983. The petitioners have given out the facts explaining why this petition has been filed after so many years of the regularization of services of the private respondents. They have come up with the case that for the first time, by Circular dated 26th April 1983, the seniority list of Assistants was published showing therein the position as on 1.1.83 and the respondents No.3 to 6 were placed above the petitioners.

Earlier, the names of respondents No.3 to 6 were not included in the seniority list. It is not the case of respondents that the orders dated 19th February 1976 and 25th April 1978 have been brought to the notice of the petitioners or otherwise they have any knowledge of those orders earlier to 26th April 1983. The petitioners have no concern with the private respondents nor they are required to find out their service record. So long as their continuation in the service is not affecting them in any manner, what for the petitioners could have bothered for all these things in normal course. Only when these respondents were sought to be made senior to the petitioners then naturally they would have gone into the depth of the matter and found what were the reasons for the same. The petitioners have filed representations immediately protesting the placement of private respondents above them and their contention was that their entry as well as continuation in the Government service and regularization are illegal and they could not have been placed above them in seniority. The petitioners also cited cases of other persons who have been also temporarily appointed but in their cases, resort to Rule 16 of the Rules 1967 has not been taken up. The respondent-State sat tight over the representation of the petitioners and further passed the orders on 8th August 1983, promoting the respondents No.3, 4 and 5 to the next higher post. Then comes the order dated 20th August 1983 under which the respondent No.6 has been given promotion. Hence this Special Civil Application has been filed and the cause of action to challenge the orders of 1976 and 1978 would have arisen to the petitioners only when the respondent-State sought to place the respondents No.3 to 6 in the seniority of Assistants above the petitioners and further to give the promotion to these persons. Moreover, looking to the facts of this case, where the respondents No.3 to 6 have been given all the benefits for which they were not entitled and it has resulted in the loss of seniority as well as future service prospects of the petitioners, who have been duly selected by GPSC, they were perfectly legal and justified to approach this Court and challenge these orders which are the foundational orders of assigning the seniority to respondents No.3 to 6 above them and consequential promotions on the basis thereof. When the petitioners' seniority as well as future service prospects are materially affected due to the orders passed in favour of respondents No.3 to 6 by respondent-State they could have challenged those orders only when the benefits of the same have been given to the respondents No.3 to 6, to their prejudice and that stage has only reached when the seniority list has been

published and promotion orders have been made. So the question of delay in challenging those orders will not arise in the present case.

##. In pursuance of the order of this Court dated 4.5.98, on behalf of the State of Gujarat, an Affidavit of Mr.V.M.Kothare, Deputy Secretary, Legal Department, has been filed on 15th June 1998. Alongwith this Affidavit, the State of Gujarat has also submitted in Court, the documents, namely (i) copy of the Special Civil Application No.831 of 1975, (ii) Affidavit-in-reply of the State Government in the said Special Civil Application and (iii) two documents, i.e. letter dated 22nd October 1975 of Ambubhai & Diwanji, Solicitors, Advocates and Notaries, the office notings on the file of the Legal Department and the letter of the Law Minister. This Special Civil Application has been decided by this Court on 22nd October 1975 and the order which was passed therein has been reproduced in the Affidavit of the State Government. This order of the Court has also been reproduced in the letter of Ambubhai & Diwanji, Solicitors, Advocates and Notaries, as well as in the notings of the Legal Department. That order reads as under:

"Mr.Shah for the petitioners produces the letter of Legal Department dated 3.10.75 and therefore withdraws this Sp.C.A. and the same stands withdrawn. Notice discharged.

Dt.22nd October, 1975"

##. From the notings of the Legal Department at page No.158 of this Special Civil Application, I find that the letter dated 13.10.75, reference of which is there in the order dated 22.10.75, was not issued by the Legal Department. However, it was informally understood that the said letter has been issued by the office of the Minister (Law). That letter has been called by the Legal Department from the office of the Minister (Law) and a copy of the same is also on record of these proceedings at page No.160. This letter is material for the purpose of deciding this writ petition and I consider it to be appropriate to reproduce the same herein, which reads as under:

Date 13-10-75

To,
Mrs.Bhartiben D.Trivedi,
and five other Assistants,
Legal Department,
Sachivalaya,
GANDHINAGAR.

Subject: Making the services permanent of
non PSC Assistants by
regularization.

With reference to your letter dated 12.8.75, I am
directed by the Minister to inform you that the
question of making your services permanent is
under active consideration of Government.

sd/- Personal
Assistant

This letter is in vernacular language and the State
Government has produced translation of the same, which
has been reproduced above.

This letter was addressed to Mrs.Bhartiben D.Trivedi and
five other Assistants, Legal Department, Sachivalaya,
Gandhinagar, and it is signed by the Personal Assistant
of the Minister of Law. However, I find from this letter
that it is sent as per the directions of the Hon'ble
concerned Minister.

##. Special Civil Application No.831 of 1975 has been
filed by six petitioners out of which, Smt.Bharti
J.Trivedi, Shri V.M.Pancholi, Kum.Shobhana N.Shah and
Smt.Nalini M.Choksi are the respondents in this Special
Civil Application. In that Special Civil Application,
the petitioners therein prayed for issuance of a Writ of
Mandamus or any other appropriate Writ, order or
direction directing the respondent therein, i.e. the
State of Gujarat, through the Secretary, Legal
Department, Sachivalaya, Gandhinagar, to regularise the
services of the petitioners in accordance with law.
Second prayer has been made for direction to the
respondent to forbear from terminating the services of
the petitioners as Assistants on the legal side of the
Legal Department in the State. Third prayer has been
made to direct the respondents to act according to law.
The background and apprehension under which that Special
Civil Application has been filed by the petitioners
therein is also to be briefly stated. The petitioners
therein, on having apprehension of termination of their
services, as the Legal Department has requisitioned six
law graduates from the Public Service Commission through
the State of Gujarat and on their appointment, as they
were likely to be replaced by duly selected persons, have
filed the aforesaid Special Civil Application. In that
Special Civil Application, the petitioners therein have
also come up with case that the even if their
appointments were assumed to be irregular, they are

entitled to be regularized and allowed to be continued on the same post where they are working today. A plea of discrimination has been taken on the ground that other persons who have been appointed on the post of Clerks/Typists, their services have been regularized and that course was not followed in their case though they made representations for the same.

##. The reply which has been filed by the Government of Gujarat to the aforesaid Special Civil Application is also important and briefly the contents thereof are to be taken, which are as follows:

(i) Recruitment to the post of Assistant is made by the GPSC in accordance with the orders issued in Government Resolution, General Administration Department No.ASC.2260/B dated 21.11.60.

(ii) Vide Government Resolution No.PRT/1565/K dated 13th July 1965, it is ordered that the selection of the candidates with legal qualification for recruitment to the post of Assistants in the Legal Department should be made by an interview to be held by the GPSC instead of a competitive examination and in case sufficient number of applications are not received, GPSC should administer test in writing in which apart from the question of general recruitment like, composition, essay, etc., questions of law should also be asked for the purpose of filling the post of Assistants in the Legal Department.

(iii) Relaxation is restricted to the selection of the candidates for filling in existing 12 posts of the Assistants in the Legal Department at that time which were either vacant or kept for non PSC. candidates. A special test was held in which six law graduates who were actually working in the Legal Department also appeared. Out of those six persons, two persons were qualified by the GPSC for appointment as Assistants and their non PSC appointment was regularized. Smt.B.D.Trivedi appeared at the PSC test but did not qualified herself for appointment and her appointment was not regularized.

It is necessary to mention here that what were the reasons which compelled the Government to continue this lady in the Department has not been disclosed but more important fact that has to be noticed is that as per the case of the

respondents in the reply to the Special Civil Application, Smt.B.D.Trivedi was appointed on the post of Assistant on temporary basis while she was holding the post of Clerk and on her non selection by GPSC for the post of Assistant, she could have been sent back to the post of Clerk. The rest of the respondents herein have been appointed after 1965.

(iv) Law graduates were available and law graduates were selected in the Legal Department. (emphasis provided).

(v) Again, it is reiterated that sufficient number of law graduates are selected for the post of Assistant by GPSC according to the prescribed recruitment rules and they have to be appointed in the Legal Department and they were to replace persons who are not selected by GPSC. During the current year, GPSC has qualified 14 law graduates for the post of Assistants and according to the recruitment rules, the appointments of some of the qualified Assistants according to the recruitment of the Legal Department will be justified.

(vi) The question of regularizing the appointments of the petitioners was considered by this Department as also by the General Administration Department. As the recruitment and the selection of the Assistants is done by GPSC, the General Administration Department had taken up the matter of regularization with GPSC. However, the GPSC was not agreeable to the proposals of regularizing the appointments of the petitioner and GPSC informed the General Administration Department accordingly.

(vii) The petitioners, when they joined their services, were informed in the appointment orders that their services are purely temporary and liable to be terminated at any time without any notice, and the petitioners cannot make any grievance against their termination and as their appointments were temporary and not in accordance with recruitment rules, they are liable to be discharged from services and being replaced by regularly recruited Assistants, by GPSC.

This reply has been submitted by the State of Gujarat, Legal Department, in this Court on 21st June, 1975, in

the Special Civil Application No.831 of 1975 filed by the private respondents herein. From this reply, it is clear that the appointments of the petitioners on the post of Assistant in the Secretariat and particularly in the Legal Department thereof, were made dehors the recruitment rules. The appointments were purely adhoc and temporary subject to the termination without any notice and assignment of any reason. The adhoc and temporary appointments of the petitioners were coterminous with the selected candidates for the post of Assistant, as and when made available by GPSC. For regularization of the services of adhoc and temporary Assistants, one point programme was there, i.e. of relaxing certain conditions and the GPSC held a special recruitment drive but it is unfortunate that one of the petitioners who appeared therein failed. The other petitioners were appointed after that one point programme for making selection by GPSC with a relaxed criteria was over. Sufficient number of law graduates were available for the post of Assistant at the relevant time and they have to be appointed in the Legal Department by replacing the non selected candidates. The question of regularizing the services of the petitioners was considered by the Legal Department as also by the General Administration Department but as the recruitment to the post of Assistants was to be made by selection through GPSC, the matter was taken up with the GPSC, which has not agreed to regularize their services.

##. From the facts which I have stated in earlier part of the judgment and the findings given thereon as well as from this affidavit-in-reply of the Legal Department given in the Petition filed by the private-respondents herein, it is clear that these petitioners were continued in the Department despite of availability of the duly selected law graduates candidates and further that the GPSC was not agreeable for their regularization. Continuation of these persons on the said post has not been explained and further it is also not explained why their services were not terminated at the point of time where one of the respondents who appeared in the special recruitment test conducted by the GPSC failed and the others did not appear for selection in the later years. Worst part is that despite of availability of the candidates selected by GPSC and further that in the special recruitment test held by GPSC one of the respondents herein failed, further temporary and adhoc appointments have been made. It is too difficult to establish personal malafide of the persons interested for these appointments, but from the facts which have come on record as well as the defence put by the Legal Department

in this Court in the Special Civil Application filed by private respondents earlier, it is a case where it can safely and conveniently be inferred that there was someone in the Legal Department behind these persons who has managed not only their appointments dehors the rules but also their continuation in services despite of the fact that, (i) duly selected candidates were made available, (ii) one of the respondents failed in the special recruitment test held by the GPSC and (iii) other respondents herein had even not appeared in the recruitment tests held by GPSC in later years. In the presence of the defence taken by the State Government, Legal Department, in the Special Civil Application filed earlier by the private respondents herein, which has been quoted in-extenso in this judgment, and in view of the other facts which have come on record of this Special Civil Application as well as the office noting of the Department, I have no hesitation to hold that resort to provisions of Rule 16 of the Rules 1967 in this case by the State cannot be said to be in the interest of public service. The element of "in the interest of public service" is altogether missing in this case and ex-facie, it is a simple and plain resort to exercise of powers as conferred under Rule 16 of the Rules 1967 for the purpose other than the interest of public service. It is a case where it can be said and in fact, what it appears to be, a case where of the regularization of the private respondents in service not in the interest of public service, but in their own interest.

##. From the letter of the Law Minister dated 13th October 1975 quoted in the earlier part of the judgment, I find that this letter is signed by the Personal Assistant and curiously enough, it was addressed to the private respondents. This letter was send under the caption "making the services permanent of non PSC Assistants by regularization". Above that, this letter has been sent with reference to the letter of the private respondents dated 12.8.75. From the noting of the Legal Department of 28th October 1975, I find that this letter is not issued from the Legal Department. In this noting, the date of the letter 3rd April 1975 appears to be wrongly taken. This position is also made clear in the noting itself on the back side of the translated copy provided to the Court. It has very specifically been mentioned in the note aforesaid of the Legal Department that the Departments informally understood that the said letter has been issued by the office of the Minister of Law. The letter dated 13th October 1975, from the aforesaid facts, apparently was not issued by the Legal Department. On the basis of this letter which has no

sanction of the Legal Department and which has been sent directly from the Ministry, the private respondents felt contended to withdraw the Special Civil Application. Much emphasis has been made by the learned Additional Advocate General during the course of arguments that the regularization of appointments of the private respondents has the approval of the Secretary, Legal Department, but from the aforesaid office noting, it clearly transpires that the Ministry at its level seems to be favouring these private respondents to the extent where the letter dated 13th October 1975 has been written without bringing the same to the notice of the Law Secretary and it was not sent from the Legal Department and this, as it is clearly borne out was issued for the purpose that before this Court an impression is sought to be created that the Government is considering the cases of private respondents for regularization. I have my own reservation that in view of the recruitment rules as framed under Article 309 of the Constitution, availability of the duly selected law graduates and further non selection of one of the respondents in the special recruitment test held by GPSC and not being selected by GPSC subsequently of any of the private respondents, their initial appointment was dehors the rules and further their appointments were purely on adhoc and temporary basis subject to termination without any notice or reason on availability of duly selected candidates which condition is impliedly there, this Court in the petition filed by the private respondents would not have passed any order of their regularization. Only to get saved from the pronouncement of this Court against them, the possibility cannot be overruled that this letter dated 13th October 1975 would have been procured and it appears to be easily procurable for the reason that the Law Ministry was behind these persons.

##. The Additional Advocate General produced on the record of this Special Civil Application, translation of the relevant noting of the file pertaining to passing of the impugned orders. I have carefully perused the translated copies of the office notings. From the noting No.33/N of the Legal Department it is clearly revealed that out of these private respondents, one Smt.B.D.Trivedi appeared for special test by GPSC but she failed. Other private respondents were appointed on adhoc-temporary basis thereafter and as such, there is no question of their appearance in the said test. The matter was taken up for their regularization through the GPSC but GPSC has not agreed to regularize the appointments of these persons as a result of which the services of these persons were to be terminated and the

these six persons were to be replaced by the Assistants selected by GPSC. It is also noticed that fourteen law graduates have been selected by GPSC for the post of Assistants. Out of these fourteen selected candidates, six law graduates were expected to be allotted to the Legal Department. Reference has been made in the noting of the Special Civil Application filed by the private respondents for their regularization of services. Looking to the fact that these six persons have to put in number of years' service and have become over-aged for any appointment in the Government services, on humanitarian grounds, it is observed that their cases deserve full sympathy. It is further stated that as appointments of these six persons have not been made in accordance with recruitment rules prescribed by the Government and as these six persons are not selected by GPSC for appointment as Assistants in the Legal Department, their cases for regularization as Assistants in the Legal Department cannot be considered by the Government unless PSC agrees to regularize their appointments. The only course which is stated to be left is to take up the matter with the PSC and the Commission may be requested to reconsider its decision. From this noting, no doubt remains whatsoever in the mind of the Court that the regularization of the services of private respondents by the Legal Department was not considered in the interest of public service. The whole approach was made on the ground that as these private respondents have put in number of years of service and now they have become over-aged, on humanitarian ground their cases deserve sympathy. The Legal Department reiterated that their appointments were purely adhoc and temporary and in built condition therein of termination of their services on availability of selected candidates from GPSC. Fourteen law graduates were available, duly selected by GPSC and furthermore, out of which, six were expected to be ordered to be posted in the Legal Department. The matter has been considered by GPSC earlier and it has declined to grant any sanction for regularization of their services. The GPSC was requested for reconsideration of its earlier decision for regularization of services of private respondents on humanitarian grounds.

##. Then comes the noting of the Legal Department, dated 2nd and 3rd July 1975. This noting reads as under:
Legal Dept.

The facts of the case are as follows:

The following six Assistants who are not

qualified for appointment as Assistants in Legal Department by the Gujarat Public Service Commission, had been appointed Assistants in this Department on purely temporary basis subject to the condition that their services are temporary and they were liable to be discharged at any moment:

1. Smt.B.D.Trivedi
2. Shri V.M.Pancholi
3. Shri T.P.Tailor
4. Smt.S.H.Kadri
5. Smt.N.M.Chokshi
6. Kum.S.N.Shah

These six Assistants were continued in this Department from time to time pending their replacement by the PSC selected candidates.

In the year 1966 a special oral test for selection and appointment of Assistants in the Legal Department was held by the Public Service Commission. In the said test six non-PSC Assistants of this Department also appeared and out of these six only two Assistants, namely, Shri S.M.Parikh and Smt.N.R.Shah were selected by PSC. Thus these two people qualified themselves for appointment as Assistants in Legal Department. Smt.B.D.Trivedi also appeared for the special test by PSC but she could not get herself qualified. The remaining five Assistants other than Smt.B.D.Trivedi could not appear for the PSC test as their appointment in Legal Department as Assistant as temporary basis in the Legal Department was made after the PSC test was held. These six Assistants were continued in this Legal Department and the question of regularization and of their appointments was under consideration of the GAD in consultation with the Legal Department. The matter was taken up with the PSC by the GAD for regularization of the appointments of these six persons. However, the PSC has not agreed to regularise the appointments of these six persons. As a result of this the services of the six persons will have to be permitted and Assistants selected by the PSC will replace these six persons. The PSC has already selected 14 graduates out of which it is expected that six law graduates will be allotted to the Legal Department and the remaining may be allotted to the Gujarat Legislature Secretariat.

It may be pointed out that the similar situation has also arisen in case of non-PSC Assistants appointed in the Gujarat Legislature Secretariat also.

Being aggrieved the six Assistants have gone to the Court of law for regularization of their appointments on the analogy of the appointments of clerks, typists and stenographers etc. which have been regularized by the PSC. The High Court has admitted the writ petition of the six petitioners and had granted interim stay upto 16.6.75 which is further continued. The matter is still pending with the High Court.

Looking to the facts of the case it seems that the six persons have put in number of years services and now they have become over-aged and age barred for appointments in any other posts under Government. These people have worked in the Legal Department for number of years. On humanitarian grounds their case deserves full sympathy. However, as the appointments of the six persons has not been made in accordance with the recruitment rules prescribed by the Government and as these six persons are not selected by the PSC for appointment as Assistants in the Legal Department, their case for regularization of their appointments as Assistants in Legal Department cannot be considered by Government unless the PSC agrees to regularise their appointments. Only solution now left is to take up the matter with the Public Service Commission and the Commission may be requested to reconsider its decision.

sd/-

2.7.75

Legal Dept.

My impression is that the question regarding regularization of the appointments of the six non PSC Assistants working in the Legal Department was taken up at high level by CS with the Public Service Commissioner (PSC). This may perhaps be on the files of the GAD. As far as I recollect the PSC was not agreeable to our proposal. It would indeed be inhuman to require these six non PSC Assistants, who are working in this Department since a number of years, to be

relieved of their jobs, particularly because they are now age-barred for any other employment in B Government. Even though these six Assistants have filed a writ petition in the High Court and obtained a stay, that should not preclude the Government from making further attempts to persuade the PSC to regularise their appointments. My suggestion is that this question may again be taken up with the PSC at high level and one more attempt should be made to have the services of these six Assistants regularized through PSC.

A few days back M(Law) had spoken to me on telephone about the case of these six Assistants. The file may therefore be shown to M(Law) so that he may be appraised of the developments that have taken place thus far.

sd/-

Secretary, L.D.

3.7.1975

From this noting, I find that the then Minister of Law seems to be behind the back of these persons. The Legal Department was not of the view that regularization of the services of the private respondents is falling under the four corners of Rules 16 of the Rules 1967. The approach of the Legal Department was only on humanitarian and sympathetic considerations. I do not find anything in this noting as to why this situation has been created in the Legal Department (emphasis provided) of the State of Gujarat. It is understandable that in the other Departments of the Government, something wrong may happen or they may act contrary to the Rules or mandate of the Constitution, but the appointments made by the Legal Department de hors the rules and the constitutional provisions is difficult to appreciate. Worst part is that they acted de hors the rules and constitutional mandate and despite of this they wanted to give premium for their own illegal and unconstitutional acts to the extent of making out a case of regularization of illegal appointments of private respondents, on humanitarian and sympathetic considerations.

From the noting of the Legal Department dated 27.11.75, it transpires that by having an approach on humanitarian grounds and considering the cases of the private respondents sympathetically they have been offered absorption as clerks for which it is desired that they furnish an undertaking. The note further reveals that

these private respondents refused to give undertaking to the effect that proposal of their absorption as clerks is acceptable to them. The Legal Department has observed that these private respondents are against the idea of absorbing them as clerks even for a short period. The Legal Department, then concluded, "As such, there is no room for any further consideration of the proposal".

Then comes the noting of the Law Ministry dated 3.12.75, and therefrom it is clear that the Ministry was behind the back of these private respondents. This noting reads as under:

It deems proper to hear the concerned Assistants before taking a decision in the present matter. They be instructed that if they wish to do so, they can represent in the matter either orally or in written at 1:30 P.M. on 8.12.75. Meanwhile, if the candidates selected by the GPSC as assistants can be appointed as such without terminating the services of the said six assistants, then they may be appointed. File be returned to me after all the six assistants have been informed as per "A".

sd/-

R.Acharya

3.12.75

sd/-

C.S. (L.R.Dalal) 4.12.75

From this noting, no room is left out that a way has been found out for continuing these persons and to regularize their services. The opinion of the Additional Solicitor also appears to have been taken.

Then comes the noting of the General Administration Department dated 16.1.76. This noting is self speaking as to how the matter has been taken up as per the directions of the Hon'ble Minister of Law and considerations are being taken. However, the General Administration Department stated that as per the existing rules the recruitment of Assistants in different Departments of the Secretariat is made as per the recommendations of the Public Service Commission, these private respondents were appointed on adhoc basis till the regularly selected candidates from GPSC are made available and they were continued from time to time. This noting of the General Administration Department is reproduced below:

Gen.Admn. Deptt./R.

Submitted, with reference to Legal Department's
note on p.48-56/N.S.

As per the directions of Hon'ble Minister (Law)

as these six non-Public Service Commission Assistants are working in Legal Department for a long time and as they can be absorbed in Legal Department, they may be so absorbed. As per the existing Rules, the direct recruitment of Assistants in different departments of Secretariat is made as per the recommendation of the State Public Service Commission and these six Assistants were appointed on ad-hoc basis till the candidates were available as per the recommendations of the Commission and that they were continued from time to time. These Assistants appointed on adhoc basis had enough opportunity to appear in the examination being held by the State Gujarat Public Service Commission, but as per the note of Joint Secretary, Legal Department on P.50-51/NS, these Assistants have not yet passed the prescribed examination and out of these six, two Assistants had appeared in the examination, but they failed. After that it is not known whether they had attempted again to appear in the examination. The remaining Assistants had never tried to appear or passed the examination.

Inspite of above position, the State Gujarat

Public Service Commission was requested to regularise the appointment of these Assistants; but the State Gujarat Public Service Commission had not agreed with the request of the Government and the Commission in its letter dated 19.9.75 has specifically stated that the department has committed the serious irregularity in continuing those candidates who were not recommended by it and the Commission in addition has also stated that it intends to take note of this serious irregularity on the part of Legal Department in its annual report. The Legal Department's view that these Assistants have not been appointed properly is also seen from the preceding note of the Legal Department.

In view of above circumstances, two alternatives
require to be considered.

(1) These six Assistants who have been

working in Legal Department for a long time; but since they have not either passed or appeared in the competitive examination held by the Commission, their services may be terminated; or

- (2) These six Assistants may be continued in service ignoring the advise of the Commission.

Submitted for orders, as to which, out of the above said alternatives, which one may be accepted.

sd/- illegible

16.1.76

So two alternatives were required to be considered as per this noting.

Then I come across the noting of the Deputy Secretary (S) dated 17.1.76, which reads as under:

Dy.Secy.(S).

Commission in its letter dated 19.9.75 has stated that the Legal Department has committed a serious...

The noting of the Law Minister dated 29.1.76 reads as under:

This is discussed with the Chief Minister. Now, no further discussion is required.

Dt.:29.1.76 sd/- R.Acharya

Chief Secy. (GAD) sd/- L.R. Dalal

30-1-

Further noting of the Legal Department and the Minister, (Law) on the file made available to the Court are as under:

Secretary (LD)

It is requested to inform as to at the end of discussion with the Chief Minister in the matter out of the two alternatives suggested by General Administration Department which alternative is to be accepted.

sd/-S.L.Talati

2.2.76

M (Law)

It is decided to do as at `A'

sd/-R.Acharya
2.2.76

Chief Minister

sd/-B.J.Patel
3.2.76

Chief Secy.

sd/-L.R.Dalal
4.2.

Secy.L.D.

sd/-S.L.Talati
4.2.76

Addl.Soli.

For further necessary action, if any

sd/-..Parikh
4.2.76

Under Secy/.(F)

Irregularity in continuing those candidates not recommended by it and that the commission intends to take note of these serious irregularity on the part of Legal Department in its annual report. The said view point of Commission was in knowledge of Government and inspite of that government has taken decision that "since there six Assistants have been working for a long time, it would not be just to terminate them and as such they be continued." In view of this order as and when the Commission takes note of this serious irregularity on part of Legal Department in its annual report, the Legal Department will have to explain the matter and reply properly.

Since the order dt.28.12.75 of Minister (Law) on p.57/N is specific, the General Administration Department is not required to give any opinion or remarks.

However, since the present matter pertains to

services, Legal Department will have to obtain orders of Hon'ble Chief Minister.

sd/-K.J.Ghoda
17.1.76

Chief Secy.
sd/-L.R.Dalal
18.1.

Chief Minister.

M.(Law), Chief Secy. and Secretary, Legal Department is requested to discuss.

sd/-B.J.Patel
23.1.76

##. The translation of some more relevant noting of the Legal Department is on the record of this Special Civil Application which is submitted by the Additional Advocate General as per directions of this Court. From these noting, I find that there were proposals for taking of these persons as clerk. Even to take them on the post of clerk, General Administration Department has pointed out so many difficulties of fixing of seniority, passing of departmental examinations, fixation of pay etc. The difficulty has also been pointed out of taking them as clerks from the date on which they were appointed as Assistants. GPSC approval is also sought to be taken. There was a suggestion also that before taking any decision to take them as clerks, their consent has to be taken. One thing more turns out from the noting of the General Administration Department that their appointments as Assistants on adhoc and temporary basis was stated to be illegal and the then Hon'ble Minister of Law was the person who was interested in these persons and has gone to the extent to see that their appointments are being regularized. The proposals were to be sent to GPSC for regularization of services of these non PSC passed Assistants as Clerks.

##. Be that as it may, one thing is very clear from the noting that the appointments of these private respondents on the post of Assistants were regularized only on the ground of their continuation in services for a long period and they have become over aged. I have already dealt with this point at length in the foregoing paragraphs and at the cost of repetition I am to say that these grounds can hardly be said to be grounds what to say to be legal grounds to regularize the services of the private respondents, particularly, in the case where

recruitment to the post of Assistants has to be made on selection by GPSC. There is catena of decisions of the Apex Court which I have considered in extenso in the foregoing paragraphs where it has been laid down that in the cases where appointments are to be made on selection by the PSC, there is no question of regularization of the services of the adhoc and temporary employees howsoever long services they have to their credit. Above that, these two consideration which have been highly prevailed with the State Government to pass the impugned orders are their own creation. It is a case where illegally these persons were continued and naturally by continuation of theirs they have become averaged also. So from the facts of this case, I am to say at the cost of repetition that the State Government wants to give premium to its own illegal and unconstitutional actions and in this case it can necessarily be inferred that these private respondents are favoured unduly and further inference can be drawn that somebody was there in the Ministry (Law) behind them who got all these things done. As I have already observed in the earlier paragraph that the then Law Minister was instrumental in getting the orders of these persons. The benefit as conferred on these persons cannot be allowed to stand. I may briefly also refer at this stage the conduct of these private respondents. Considering their appointments to be illegal appointments being de hors the recruitment rules, at one point of time, it has been thought of by the State Government to absorb them as clerks, but they have insisted for their continuation and regularizations on the post of Assistants. This insistence of the persons who got their entry in the Department de hors the recruitment rules further fortifies the view which I have just taken that they had behind them the then Law Minister, otherwise a person who has illegally been entered in the services will accept whatever services are given to him and he will not insist for the very services, more so when it is within the purview of the GPSC. So the very basic ground which prevailed with the respondent-State to regularize the services of the private respondents is not available and as such, the orders impugned cannot be said to be legal and in conformity with the provisions of Rule 16 of the Rules 1967 and made in the interest of public service.

##. From these notings and the contention of the learned Additional Advocate General, one other thing is borne out that ultimately it is decided that the private respondents may be continued in service ignoring the advice of the Commission. From these noting, which are self speaking, I have no doubt in my mind that the Law Minister was instrumental and behind the back of these

persons and he has gone to the extent of regularizing the services of these persons though GPSC has declined to grant its approval. The Law Department, at one point of time opined that acting contrary to the opinion of the GPSC may result in manifold consequences but still that has not been taken to be serious and the course adopted is to continue these private respondents ignoring the advice of the Commissioner. The learned Additional Advocate General though contended that it is not binding on the State Government to accept the opinion of the GPSC in the matter of appointments and this provision is only a directory provision. I am not deciding this question on merits and not expressing any final opinion, but prima-facie there appears to be a distinction in between recruitment to be made on the recommendation of the GPSC and where the adhoc and temporary appointments of the candidates are made dehors the rules, and where out of these candidates, some of the candidates have failed in the examination and others have not appeared, and further to regularize and continue them, weightage deserves to be given to the opinion of the GPSC more so when the post on which regularization is to be made is within the purview of GPSC. The very fact that the opinion of the GPSC has altogether been given a go-bye gives out to what extent these persons have been favoured by the Law Ministry.

##. Now I may deal with the last contention of the learned Additional Advocate General. Carrying the last contention further, he urged that out of these private respondents, one has already retired from the services and other is going to retire in a near future. It has further been contended that these persons are continued in services for all these years and even if their appointments could not have been regularized still this Court may not interfere at this stage. The learned Additional Advocate General urged that this Court may take humanitarian and sympathetic approach and keeping in view the long services of the private respondents, the Court may not interfere in the matter.

##. On the other hand, the learned counsel for the petitioners, replying to the additional submissions made by learned Additional Advocate General to his last contentions made in opening arguments, contended that it is true that these persons are continuing in service for the years together but it is equally true that the petitioners filed this Special Civil Application in this Court in the year 1983. Their continuation in the services from 1983 till date is only for the reason that this Court has not decided this Special Civil Application. So far as the earlier continuation is

concerned, the learned counsel for the petitioners vehemently contended that the person who was interested in the private respondents has made them to continue in services despite of the fact that the GPSC selected candidates were available from time to time and further none of them has been selected by GPSC. It is a case where despite the Court has put to the Additional Advocate General to bring on record how these persons were continued in services and why their services were not terminated when the GPSC selected candidates were made available, those questions were not replied. It is a case where the Legal Department of the Secretariat has acted illegally. The illegality is to the extent of making appointment of these private respondents dehors the Rules and further in violation of the provisions of Articles 14 & 16 of the Constitution and if sympathetic and humanitarian considerations are taken in such matters, there will be no end and these illegal orders will not be quashed and set aside by this Court at any point of time. Lastly, Shri Hathi, learned counsel for the petitioners contended that the complete future prospects of the petitioners have been put in jeopardy because of taking over march by the illegally appointed persons in the seniority over duly selected candidates. They got promotions earlier and further for all the years to come, the petitioners will not get promotions.

##. I have given my thoughtful considerations to the last submission made in opening arguments and additional submissions to this last contention made by the counsel for the parties.

##. In the case of Ahmedabad Municipal Corporation v. Virendra Kumar Jayantibhai Patel (supra), speaking for the Apex Court, Hon'ble Mr. Justice V.N. Khare observed, "there is no room for sympathy or equity in the matter of such appointment specially where the recruitment in service is governed by the statutory rules". In the case before the Apex Court, the respondent therein was appointed on adhoc temporary basis in services of the Corporation and on which post recruitment was to be made by selection. The respondent has not been selected in selection and then he approached the Tribunal for regularization of his services. The Tribunal has ordered for his absorption and on the Appeal filed by the Corporation, the matter has come up before the Apex Court. It appears from the judgment that long continuation of respondent in service was one of the factors which prevailed with the Tribunal to pass the order for his absorption. In the background of these facts, speaking for the Court, Hon'ble Mr. Justice

V.N.Khare, further observed, "If the reasoning given by the Tribunal is accepted, the statutory recruitment rules would become nugatory or otiose and the department can favour any person or appoint any person without following procedure provided in the recruitment rules which would lead to nepotism and arbitrariness". The Court has further gone to observe, "once the consideration of equity in the fact of statutory rules is accepted then eligible and qualified persons would be sufferers as they would not get any chance to be considered for appointment. The result would be that persons lesser in merit would get preference in the matter of appointment merely on the ground of equity and compassion". The Court has held that, "it is not safe to bend the arms of law only for adjusting equity". Lastly, the Court concluded that the reasoning given by the Tribunal that sympathy demands the absorption of the respondent in service of the Corporation suffers from error of law.

##. This matter is squarely covered by the aforesaid decision of the Apex Court in the case aforesaid. The facts of this case are almost similar to the facts which were there for consideration before the Apex Court. In this case also one of the private respondents, as stated earlier, appeared in the special recruitment test held by GPSC, but she failed. This respondent again appeared for regular selection but she failed. One other respondent appeared twice for selection but was not selected. The other private respondents even not appeared at any point of time for their selection before GPSC. Their appointments were purely adhoc and temporary and in fact, these appointments were dehors the Rules and further their appointments were subject to the condition of termination thereof without any notice or reasons and as these appointments have been made purely on adhoc basis, there in-built condition of termination of the same on availability of selected candidates. I do not find that any equity is there in favour of private respondents. As observed by the Apex Court in the case aforesaid, if these impugned orders are not interfered only on the ground that these persons are working for the years together and if it is taken to be a case of equity and compassion, then the recruitment rules will become nugatory and this Court will put a seal of affirmation on the actions of the respondents to continue the private respondents who are not selected by GPSC and the persons who have not been able to face selection.

##. This Court cannot be oblivious of the fact that the Legal Department in the Secretariat is there to see that all other Departments of the Government work within the

framework of the Constitution as well as Acts, laws, Rules etc. as framed by the Government from time to time. So it is the primary duty and obligation of the Legal Department of the Secretariat to advise the Government in the legal matters. The Legal Department, in its own turn is also expected to act within itself legally but in the present case, the Legal Department has itself acted de hors the recruitment rules. Not only it has gone to the extent of making appointment de hors the Rules, it continued those appointees, out of which two were not selected twice for the said post by GPSC and two have not applied, despite of availability of selected candidates from GPSC, and thereafter ultimately resorted to provisions of Rule 16 of the Rules 1967 to regularize their services.

##. Looking to the facts which have come on record of the Special Civil Application on which the parties are not at variance, it cannot be said to be a case where the services of respondents No.3 to 6 have been regularized in the interest of public service, and on the contrary, it is a clear case where their services have been regularized in the interest of individuals. Equities no doubt, sometimes play an important role and in many of the cases, despite the Courts have found some illegality here and there in appointments or regularization etc. still the Courts have declined to interfere, but the present one is a case where if such a view is taken and equity is allowed to prevail over all these illegalities committed by none other than the Legal Department of the Secretariat of the State, then certainly, as rightly prayed by the learned counsel for the petitioners, there will be no end to all these illegal appointments and it will open the floodgates for favouritism and nepotism.

##. If we go by the facts of the present case, then certainly it cannot be said to be a case where this Court should give consideration to equity and show any sympathy to respondents No.3 to 6. This contention made by the learned Additional Advocate General cannot be accepted.

##. In the result, this Special Civil Application succeeds and the same is allowed. The orders annexures 'C' and 'D' dated 19th February 1976 and 25th April 1978 respectively are quashed and set aside. Consequent upon the quashing of those orders, the orders annexures 'G' and 'G-1' dated 8th August 1983 and 20th August 1983 also are quashed and set aside. The respondents are directed to prepare the fresh seniority list of the Assistants by placing the petitioners at appropriate place and to consider their cases for promotion to the next higher

posts as per their seniority with reference to the date from which the private respondents were given promotions from time to time on the higher posts. Further, if the petitioner or any of the petitioners is/are found suitable for promotion for the higher post, they or he/she shall be entitled only for notional benefits for the interregnum. The parties are directed to bear their own costs of this litigation. Rule is made absolute.

.....

(sunil)